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March 20, 2018

**By ECF**

Honorable Kimba M. Wood  
United States District Judge  
Southern District of New York  
500 Pearl Street  
New York, NY 10007

**Re: *Rigas v. United States*, No. 11 Civ. 6964 & 02 Cr. 1236**

Dear Judge Wood:

At the status hearing on March 15, 2018, the Court requested a letter regarding the procedural rules in 28 U.S.C. § 2255 proceedings for subpoenaing individuals to appear for in-court testimony at an evidentiary hearing. Rule 12 of the Rules Governing § 2255 Proceedings combined with Rule 17 of the Federal Rules of Criminal Procedure authorize this Court to permit the parties to compel in-person attendance of witnesses at the hearing.

Rule 12 of the Rules Governing § 2255 Proceedings provides that “[t]he Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.” Accordingly, courts regularly apply provisions of both sets of procedural rules to § 2255 proceedings. *See, e.g., United States v. Daily*, 703 F.3d 451, 454 (8th Cir. 2013); *Thai v. United States*, 391 F.3d 491, 497 (2d Cir. 2004).

Federal Rule of Criminal Procedure 17(e)(1) provides that “[a] subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States.” No statute or procedural rule applied to § 2255 proceedings is inconsistent with the use of Federal Rule of Criminal Procedure 17 subpoenas in such proceedings. Indeed, the Second Circuit has characterized § 2255 proceedings as “a step in the underlying criminal case.” *See United States v. Clark*, 984 F.2d 31, 33 (2d Cir. 1993).<sup>1</sup> Accordingly, courts have found that district courts have the discretion to allow the parties to issue Federal Rule of Criminal Procedure 17 subpoenas

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<sup>1</sup> It should be noted that our research disclosed one case that characterized § 2255 proceedings as “decidedly civil” and, accordingly, applied Federal Rule of Civil Procedure 45 to the issuance of subpoenas for testimony at a hearing. *See Johns v. United States*, Nos. 09-0386-WS-C, 07-0232-WS-C, 2011 WL 1344245, at \*1 (S.D. Ala. Apr. 8, 2011).

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to compel a witness to attend a § 2255 proceeding and provide testimony. *See United States v. Lee-Speight*, 576 F. App'x 801, 803 (10th Cir. 2014) (Gorsuch, J.) (noting that the issuance of a Rule 17 subpoena in a § 2255 proceeding is “generally left to the district court’s discretion”); *Penland v. United States*, No. 1:09CV398, 2010 WL 1006883, at \*4 (W.D.N.C. Mar. 17, 2010).

Petitioners therefore request that the Court authorize the parties to issue subpoenas pursuant to Federal Rule of Criminal Procedure 17 to compel attendance at an evidentiary hearing in this matter.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 20th day of March, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties with an e-mail address of record who have appeared and consent to electronic service in this action.

Dated: March 20, 2018

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